In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 758

VIRGIL D. WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (R. 49-64) is reported at 108 F. Supp. 454. The opinion of the Court of Appeals (R. 217-223) is reported at 211 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1954 (R. 224). A petition for rehearing was denied on April 2, 1954 (R. 231) and the petition for a writ of certiorari was filed

on May 14, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly held that the selection of petitioner's land by the Secretary of the Army as necessary for a dam and reservoir project has sound reasons to support it and cannot be overturned by the courts.

STATUTE INVOLVED

The relevant part of the Act of June 28, 1938, sec. 2, 52 Stat. 1215, as amended, provides as follows (33 U. S. C. 701c-1):

> * * * Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of the Army is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of the Army and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any

channel improvement or channel rectification project for flood control heretofore or herein authorized: *Provided,* That no reimbursement shall be made for any indirect or speculative damages: *Provided further,* That lands, easements and rights-of-way shall include lands on which dams, reservoirs, channel improvements, and channel rectifications are located; lands or flowage rights in reservoirs and highway, railway, and utility relocation * * *.

STATEMENT

This condemnation proceeding was instituted to acquire an 80.9-acre tract of upland near the center of the 101,000-acre Bull Shoals Dam and Reservoir Project on the White River in Arkansas. A declaration of taking was filed and $1,800 was deposited as estimated just compensation (R. 5, 8-11, 38).[1] Both the condemnation petition and the declaration of taking recite Acts of Congress which concededly authorize and appropriate funds for this Project and provide for the selection and acquisition of all necessary lands by the Secretary of the Army (R. 1-2, 8-9; Pet. 3). They further state that, pursuant to those Acts, the Secretary has selected this land and has found that it is necessary for the construction and operation of the Project (R. 2, 9). Maps accompanying the pleadings show that this tract is a long, narrow peninsula extending into the reservoir near the center of the

[1] It was agreed that this was the value of the land.

Project without access within the State in which it lies except across the waters of the reservoir (R. 11, 23).

Petitioner, by motion and answer, denied the power of the United States to take this tract on the grounds that the taking was not necessary, was not for a public use, and was arbitrary, capricious and in bad faith (R. 15-17, 20-23). A motion by the Government to strike those allegations as not being material and not within the issues was denied (R. 17-18).

At the trial of the question thus required, evidence was adduced relating to the various steps and considerations in planning the Project and selecting the land and to the topography, location, use, economic features and access of this tract and other tracts taken (R. 25-39, 67-197). Weighing this evidence, the district court disagreed with the selection of the tract and held that the acquisition of it was not necessary for the Project; that, therefore, the taking was not for a public use or for purposes within the statute; and that the Secretary's determination of necessity was arbitrary, capricious, unreasoned, or in bad faith (R. 56-64). The court dismissed the petition for condemnation and set aside the declaration of taking (R. 65).

On appeal by the United States (R. 203), the Court of Appeals reversed. It held that, assuming the question were open to the courts, the selection of this tract could not legally be regarded as arbi-

trary and capricious in the face of the evident "reality", which was a factor in the selection (R. 84, 90, 91, 112-115, 118-119, 124, 148-178), that this narrow peninsula extending into the heart of the reservoir was an excellent vantage point for supervision of the reservoir and, if left in private hands, posed problems of sedimentation and control of activities for the Federal Government as well as problems for the school, police, fire and other systems of the State of Arkansas (R. 222-223).

ARGUMENT

Petitioner's constitutional rights have not been violated as asserted (Pet. 3, 6, 23, 25, 27-28). The determination by the administrative officer designated by Congress as to the necessity for, and the quantity of, a taking for a public use is not the subject of judicial inquiry. *United States* v. *Carmack*, 329 U. S. 230, 243; *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700, 709; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 685; *Shoemaker* v. *United States*, 147 U. S. 282, 298.[2] De-

[2] The decisions relied upon by petitioner do not state a contrary rule. *United States* v. *Richardson*, 204 F. 2d 552 (C.A. 5), merely refused to review an order abating proceedings until discovery process was complied with because the order was not final, and held that if there was error it was invited error (Pet. 5, 24). *Cincinnati* v. *Vester*, 281 U.S. 439, as explained in *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 552, held only that the resolution of the City Council did not comply with the requirement of Ohio law as to statement of the purpose of the appropriations and refrained (281 U.S. at

spite this established principle, petitioner's contentions that his land is not being taken for a public use and that he has been denied due process, because the court below denied him an independent judicial determination of the land to be taken, are based solely on his assertion that this land is not necessary for the Project and constitutes an excessive taking (Pet. 3, 4, 5, 23, 24-29). He supports that assertion and seeks to make it binding by standing on the erroneous assumption of the trial court, contrary to the foregoing rule, that it was "the right and duty of the Court to review the action of the officials in deciding that the land of the defendant was taken for a public purpose and was necessary for the construction and operation of the dam and reservoir project" (R. 58). It was on this incorrect basis that the court found on "the weight of the evidence" (Pet. 20) that acquisition of this tract is not necessary for the Project (R. 60-61, 62, 64), is a "patently excessive condemnation" (R. 64), and then concluded that the administrative action was arbitrary, capricious and unreasoned[8]

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449) from passing on other questions that had been argued (Pet. 5, 25, 28).

Petitioner's assertions (Pet. 8, 20-21, 32) that the second proviso in the statute quoted above (p. 3) amounts to a limitation that only land to be actually covered by the dam or reservoir can be taken plainly misconstrues the statute.

[8] Petitioner and the trial court refer to possible recreational use of this tract as casting doubt on the need for it (Pet. 6, 16-17, 21, 27, 29-30; R. 54-55, 62-63). Such use is expressly authorized by Congress. Act of December 22, 1944, 58 Stat. 887, 889-890, 895-896, 16 U.S.C. 460d. After this land had been selected for the Project, a tentative plan to place home

(R. 64). There is plainly no merit to petitioner's contentions based on this misconception of the judicial function.

Moreover, since all the facts on which petitioner bases his charges had been received in evidence under the trial court's theory, the Court of Appeals examined them for arbitrary and capricious action. The test of that is not the weight of the evidence, as petitioner urges (Pet. 20), but whether the administrative action is devoid of any reason or adequate determining principle. *United States* v. *Carmack*, 329 U. S. 230. The trial court did employ those terms but obviously with reference to its view of the weight or persuasiveness of the evidence, and it overlooked, as the Court of Appeals pointed out, the evident and incontrovertible realities of his tract, in its relation to the reservoir, which furnish sound reasons for its selection. In such a circumstance, the court may not substitute its judgment for that of the officer designated by Congress to make the decision. Thus, petitioner's arguments on the evidence, seeking to show that other factors outweigh those pointed to by the Court of Appeals, would not, even if accepted, es-

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and club sites on it, as an incidental use, was proposed (R. 25-31, 45). But that was disapproved (R. 97, 142-147). The Orders and Regulations of the Secretary of the Army forbade selection for recreational or other incidental uses (R. 106-115, 148-188). These orders were followed (R. 72, 78-105, 115-148, 194). There is no evidence to the contrary.

Also, contrary to petitioner's assertions (Pet. 7, 18, 22-23, 26, 28), there were many other tracts taken which were comparable in size and location to the one here (R. 189-193, 197).

tablish that the selection was arbitrary. The contentions of arbitrariness are therefore without merit in law and present nothing for judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 901027 1370